United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

76-7207

United States Court of Appeals

For the Second Circuit

Docket No. 76-7207

PRUDENTIAL OIL CORPORATION,
Plaintiff-Appellee,

vs.

PHILLIPS PETROLEUM COMPANY,
Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

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—against—

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BRIEF OF DEFENDANT-APPELLANT

Preliminary Statement

Phillips Petroleum Company, a Delaware corporation ("Phillips"), appeals from that part of a judgment which awarded plaintiff Prudential Oil Corporation, a New York corporation ("Prudential New York"), $2,690,968.70 (consisting of a verdict of $1,500,000 and an additional $1,190,968.70 in interest) entered by the United States District Court for the Southern District of New York (Hon. Charles L. Brieant), after trial by jury in an action based solely on diversity of citizenship.

The Issues Presented for Review

1. Should the judgment be reversed and the complaint dismissed for lack of subject matter jurisdiction because of the collusive assignment of the claims in suit in violation of 28 U.S.C. § 1359?

If the Court does not direct the dismissal of the complaint, then the following issue is presented:

2. Should the judgment be vacated and a new trial ordered based upon the absence of support in the record for the jury's verdict and its clearly excessive size?

If the Court neither directs dismissal of the complaint nor orders a new trial, then the following issue is presented:

3. Should the judgment be reversed as to the award of pre-judgment interest and the District Court directed to reduce the amount of interest in accordance with New York Civil Practice Law and Rules § 5001?

Statement of the Case

A. The Claims Asserted in the Complaint

Plaintiff Prudential New York was organized under the laws of New York in July 1966 by Nathan M. Shippee and his secretary and received the claims in suit by assignment from its parent, a Delaware corporation formerly known as Prudential Oil Corporation ("Prudential Delaware"). Prudential New York thereafter commenced this action against Phillips, a Delaware corporation, on September 27, 1967, asserting its entitlement to the entire equity interest in a petrochemical facility which Phillips was then constructing in Puerto Rico.

The complaint (A-2),* relying on events in 1962 and 1963, alleged that plaintiff's predecessor in interest and Phillips had agreed to form a joint venture for the construction and operation of a petrochemical facility in Puerto Rico; that plaintiff's predecessor in interest pursuant to this agreement disclosed to Phillips information which enabled it to obtain in 1965 an oil import quota essential to the project; that in exchange for its disclosures, plaintiff's predecessor in interest was to be accorded the equity interest in the company organized to construct and operate the project facilities; and that, after the granting of the oil import quota and the beginning of construction of the facility, Phillips refused to acknowledge the alleged role in the project of plaintiff's predecessor in interest. In addition to its contract claim of joint venture, Prudential also

* The appendix is in three parts. The first volume (A-1-A-526) includes the complaint, answer, stipulation of facts, decisions below and related materials. Volumes II-V of the appendix contain the complete trial transcript. The original numbering of the transcript has been retained, and it is cited (Tr.). The exhibit volumes are numbered I-VII, and cited (E-).

asserted claims of misappropriation of its business concepts by Phillips, and for recovery in quasi-contract. Prudential New York alleged that it had no adequate remedy at law and asked that the Court impress a trust in its favor upon the Phillips Puerto Rican project.

B. Summary of Proceedings

In early 1968 plaintiff abandoned the prosecution of the action, and it was only revived as an active litigation by the intervention of the District Court at the end of 1969. (A-1a) Plaintiff took no depositions of defendant until 1972, four and a half years after the institution of the action. (A-1b)

The District Court (Hon. Charles L. Brieant) by decision dated June 17, 1975, denied defendant's motion to dismiss for lack of subject matter jurisdiction pursuant to 28 U.S.C. § 1359 (398 F. Supp. 233, A-471), but certified the question for immediate appeal. (A-491) This Court on August 13, 1975 denied interlocutory review pursuant to 28 U.S.C. § 1292(b) (A-493) and the question of jurisdiction is accordingly presented at this time.

Despite the overall equitable nature of the complaint in this action, the District Court (Hon. David N. Edelstein) denied the defendant's motion to strike the plaintiff's demand for a jury trial (392 F. Supp. 1018, A-130) and the trial to a jury commenced on January 5, 1976 before Judge Brieant. Following the close of plaintiff's case, the District Court, on January 16, dismissed so much of plaintiff's claims as were based on the theory of joint venture and all its claims for equitable relief. (Tr. 1243-1251)

Thereafter, the two claims upon which the jury ultimately based its verdict were asserted for the first time by plaintiff. First, the Court granted, over defendant's objection, plaintiff's motion for an amendment of the complaint to assert a claim based on an implied in fact contract to pay for a business concept. (Tr. 1257) Later, after both sides rested, plaintiff's counsel orally asserted for the first time a claim that in 1963 (rather than at some later time) defendant had misappropriated a business concept of plaintiff's. (Tr. 2216)

The jury on January 27, 1976 returned a verdict for plaintiff in the amount of $1.5 million, and by answers to special interrogatories indicated that either a tortious misappropriation or a taking of business ideas pursuant to a contract implied in fact had occurred on December 16, 1963. (Tr. 2315-16)

On March 2, 1976 Judge Brieant entered findings of fact, conclusions of law, and a judgment for $2,690,968.70 ($1,500,000 plus interest from December 16, 1963), with costs to be taxed, and denied defendant's motion for judgment notwithstanding the verdict. (A-514, 522) The Court filed a memorandum opinion on March 3, 1976 with regard to its denial of Phillips' motion for judgment notwithstanding the verdict. (A-503) Judge Brieant by opinion and order dated March 25, 1976 (A-525) denied Phillips' motion to amend the judgment with respect to the computation of interest and for a new trial. Phillips filed its notice of appeal on April 23, 1976. (A-526)

C. Facts

The facts of this appeal principally concern events in 1962 and 1963 and the subsequent establishment by Phillips of a substantial petrochemical plant and related facilities in Puerto Rico. These events must be viewed in the context of the efforts of the Commonwealth of Puerto Rico, over a period of several decades, to develop the industrial economy of the Island, and the changing regulation by the United States of the import of petroleum and petroleum products.*

(1) The Origins of the Phillips Project in the Puerto Rican Government's Industrial Development Policy

In 1942, the Puerto Rican Government commenced a program known as "Operation Bootstrap" to encourage

* While the District Court's dismissal of plaintiff's claims of joint venture and for equitable relief (from which no cross-appeal was filed) has narrowed the range of issues on appeal, a full statement of factual background (including the origins of the Phillips project and the role of various participants, including plaintiff's predecessor, in earlier efforts to develop a project) remains necessary to the consideration of the issues presented on this appeal.

industrial and commercial development in Puerto Rico. After 1950, the program was administered by an agency of the Commonwealth known as the Economic Development Administration ("EDA"). (Stip. Facts, A-39) Because Puerto Rico lacked any indigenous raw materials suitable for industrial use, the refining of imported petroleum and the processing of its by-products were recognized from an early time as critical to the goals of Operation Bootstrap. EDA visualized significant expansion of industry and related job opportunities through the development of satellite plants around the core of petroleum refineries on the Island. (E-1708-09) Since Puerto Rico had no crude oil of its own, this anticipated industrial expansion depended on the availability of relatively inexpensive foreign crude oil. The availability of such inexpensive crude oil was, however, curtailed and placed under stringent regulation by the Mandatory Oil Import Program which became effective in 1959. (Stip. Facts, A-42) Under this program, the import into Puerto Rico of crude oil and its lighter fractions ("naphtha") required the grant of a quota allocation by the Oil Import Administration of the Department of Interior.

(2) Efforts by Coan and Chapman to Promote a Third, Petrochemically-Oriented Refinery in Puerto Rico

In 1961, the Economic Development Administration adopted a policy of encouraging the establishment in Puerto Rico of a third oil refinery, to serve as the basis for a petrochemical complex to provide raw materials for industry on the Island. (Stip. Facts, A-39) By that time, the two refineries built in Puerto Rico in the 1950's had achieved financial solvency, but because of their design and commercial orientation, did not provide an adequate source of petrochemical raw materials required for expanded industrial operations in the Commonwealth. (Stip. Facts, A-39, Tr. 1953, E-1793)

In connection with this policy of actively promoting a third petrochemically-oriented refinery, EDA's representatives, beginning in 1961, initiated a search for private

parties interested in and capable of sponsoring such a project, and the Administrator of EDA, Rafael Durand, made known to officials in the Interior Department (which administered the Mandatory Oil Import Program) the Commonwealth's strong interest in obtaining the oil import quota necessary to supply a third refinery. (Stip. Facts, A-42-43)

Commencing in this same period of 1961, various private parties expressed their interest to officials of EDA in establishing a third refinery in Puerto Rico. One group of individual promoters (the "Gibbs group") during the summer of 1961 enlisted Jack P. Coan and his private consulting firm, Omega Management, Inc., to help develop a plan for such a petrochemically-oriented refinery. Using various studies which he ordered from the Universal Oil Products Company, Coan in the fall of 1961 made the first of a series of presentations to EDA with respect to a refinery-petrochemical complex in Puerto Rico. (Stip. Facts, A-42-43, E-1730)

In December 1961, Coan enlisted the services of Oscar L. Chapman, a Washington lawyer and former Secretary of the Interior, to assist the Gibbs promotion group in obtaining an import quota for the proposed Puerto Rican project. Over the ensuing four years, although various promotion groups were formed and dissolved, Coan and Chapman continued to work together and maintained close contact with representatives of EDA in their effort to establish a third petrochemically-oriented refinery in Puerto Rico and obtain the import quota necessary for such a project. (Stip. Facts, A-41-44, 46, 47-48, 50-52, 53-54)

After Coan's initial approach to him in December 1961, Chapman asked Bruce K. Brown, an experienced oil executive, to consult with him on the project, and when the Gibbs group dissolved in the spring of 1962, Brown assumed the leadership of the group in trying to put such a project together. During the first half of 1962, the first of several approaches was made to Phillips as the Brown group sought to enlist Phillips' participation in the refinery-

petrochemical project. (Stip. Facts, A-45) Phillips advised Brown, after a presentation to its officers in May 1962 (E-294, E-296) that it was not prepared at that time to make a commitment to such a project. (Stip. Facts, A-46-47, E-309) In June 1962 Brown withdrew from the effort to develop a project and Coan and Chapman, continuing their efforts, turned to others in seeking a sponsor for such a project. (Stip. Facts, A-47)

(3) Coan and Chapman's Efforts with the Shippee-Warburg Group

In October 1962, Coan and Chapman were introduced by a member of the investment banking firm of E. M. Warburg & Co. ("Warburg") to Nathan M. Shippee and Edward J. Willey who agreed in conjunction with Warburg to sponsor a Puerto Rican project with Prudential Oil Corporation, a Connecticut corporation ("Prudential Connecticut"). (Tr. 147-53, 160-63) Prudential Connecticut was engaged in selling interests in oil drilling operations to individual investors seeking tax shelters. Shippee was the chairman and Willey the president of Prudential Connecticut. In 1962, the capital invested in Prudential Connecticut was approximately $10,000. (Tr. 42[illegible])*

Shippee was personally acquainted with Robert B. Anderson, a former Secretary of the Treasury, who in 1962 was a business and legal consultant in New York City. Anderson had been retained in 1961 by Phillips for occasional consulting work, but he also was a business partner of Shippee's and Willey's. (Tr. 751, 429-30) Shippee accordingly asked Anderson, on behalf of the Shippee-Warburg group, to use his contacts with Phillips to obtain an arrangement under which Phillips would sell crude oil to the proposed third refinery-petrochemical project in Puerto

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* Shippee testified that the assets of Prudential Connecticut (and successor companies) were at the time of trial estimated at $90,000,000 (based on the value, at $10 a barrel, of 9 million barrels of oil in the ground) (Tr. 410). In contrast, plaintiff Prudential New York has no assets other than the claims in suit, which it received by assignment from its parent Prudential Delaware. (Tr. 416, Answers to Defendant's Interrogatories 3 and 4, sworn to April 26, 1971, A-103-04.)

Rico and would buy from the facility refined petroleum products not consumed in the petrochemical operations. (Tr. 166)

Anderson asked Stanley Learned, the President of Phillips, if Phillips would consider such an arrangement and under date of November 13, 1962, Learned wrote to Prudential Connecticut, attention of Shippee, stating that Phillips was prepared to furnish 30,000 to 60,000 barrels per day of crude oil for refinery charge stock and to purchase the refined petroleum products not consumed in the petrochemical operations. (Complaint, A-20; E-998) Learned further indicated in his letter that Phillips was prepared to counsel Prudential with regard to the design, construction and operation of the proposed facilities, and to proceed to negotiate and complete the back-to-back supply contracts. No such contracts were in fact ever negotiated.

Members of the New York office staff of Phillips—its headquarters and principal offices are in Bartlesville, Oklahoma—did work briefly with Shippee and his associate Thomas R. Young during the first three months of 1963. (Tr. 1361-65) However, the Shippee-Warburg group failed to develop a satisfactory petrochemical project, and accordingly Phillips in April 1963 advised Prudential that it would have nothing further to do with its project until Prudential was able to obtain an oil import quota. (E-1019)

In late 1962 Coan had introduced Shippee to representatives of EDA and Shippee thereafter attempted to get from EDA a letter of support for the project promoted by his group, similar to those previously furnished by EDA to Coan and Chapman. (E-144, E-306) However, the Shippee-Warburg group was unable to convince the representatives of EDA that they had "the 'know-how', financing or marketing potential to make the project work" and EDA never gave its support to the project as presented by the Shippee-Warburg group. (E-923-24) In March 1963 the Shippee-Warburg group was informed by EDA that their proposal was "not satisfactory". (E-818-19, *cf.* E-1799)

Notwithstanding the disapproval of his project by EDA, Shippee went through the motions of having the brochure

of the rejected project prepared in multiple copies, asked the Phillips office staff in New York, as a favor to him, to reproduce pages for inclusion in the copies of the brochure and sent copies of the brochure to Chapman in Washington with the request that he file them with the Interior Department as a request for an oil import quota. (Tr. 502-06) Knowing that the proposal lacked the support of EDA and could not win the approval of the Interior Department, and in the light of serious criticism from the Warburg investment bankers, Chapman declined to take any further action on the Shippee-Warburg project. (E-1863, 1874-75)

On July 2, 1963 Shippee was involved in the crash of a Mohawk Airlines flight between Rochester and Westchester Airport. Shippee fortunately escaped serious injury, but, as he subsequently testified in a damage suit against the Airline, he was unable to continue with the promotion of the Puerto Rican refinery project after July 1963 and in his absence the Puerto Rican government turned to others. (Tr. 518-21, E-1814-17)

(4) The Development by Phillips in the Second Half of 1963 of a Proposal for a Petrochemical Plant in Puerto Rico

In early August 1963 Chapman spoke with the president of Phillips and inquired if Phillips itself would consider sponsoring a third petrochemically-oriented refinery in Puerto Rico. After a preliminary meeting of Phillips representatives with Chapman in August 1963, Phillips began to formulate a three-way program, involving a Puerto Rican petrochemical project and an Algerian refinery, with the heavier fuel oil fraction from the refinery in Algeria shipped to Europe and the lighter naphtha fraction used as the charge-stock for a petrochemical plant in Puerto Rico. (E-1414, Tr. 1487-88)

Satisfied with the general feasibility and desirability of such a program, Phillips in November 1963 retained Chapman and his law firm as counsel to apply for the necessary oil import quota and retained Coan and his Omega Management firm as consultants in connection with presenting the

Phillips project to EDA. Chapman was paid an initial retainer of $12,500 and Coan a monthly consulting fee of $2,000. (Tr. 1489, E-321)

With the assistance of Chapman and Coan, Phillips, under date of December 16, 1963, submitted its initial written proposal to EDA, describing a petrochemical plant utilizing a naphtha charge stock to be shipped to Puerto Rico from a foreign refinery. (E-323) In early January 1964, representatives of Phillips met with Puerto Rican officials and made an oral presentation of Phillips' technical and marketing capability and of their proposal for a petrochemical plant. EDA received the Phillips proposal with enthusiasm. Chapman during January 1964 filed the initial petition on behalf of Phillips for an oil import allocation and EDA communicated its support of the Phillips project to the Secretary of the Interior. (Stip. Facts, A-50)

During the early January meeting in Puerto Rico, Phillips exhibited a draft brochure (J-45) which incorporated several innocuous introductory sentences from an earlier proposal for a crude oil refinery which Shippee had utilized in his unsuccessful promotion of the project. (E-1052, E-1180)* The Phillips January 1964 brochure (which contained the borrowed introductory sentences) met with an unfavorable reception from the Puerto Rican officials (Tr. 1311-12, 1697) and consequently was discarded and not utilized in any further presentations of the Phillips project. (*Cf.* E-457, Stip. Facts, A-50-51.)

(5) Oil Industry Opposition to the Phillips-EDA Proposal

The Phillips proposal for a petrochemical plant in Puerto Rico, backed by EDA, created a furor in the oil in-

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* An exhibit prepared by plaintiff—setting forth these incorporated phrases—is included as an addendum to this brief. The legal significance of such incorporated phrases is considered *infra pp.* 32-33. The Shippee brochure had been furnished to Phillips by Shippee and his associates during its preparation in February and March 1963 (Tr. 1362-63, 1367, 1381-82, 1408), and Shippee himself had delivered the material to Phillips for reproduction later in the spring of 1963 (Tr. 282-284, 1458-59); thereafter in August 1963 Chapman had given a copy of the brochure to Phillips (Tr. 1710).

dustry, with competing oil companies opposing the granting to Phillips of the import authorization which was essential for the Puerto Rican project to go forward. (Stipulated Facts, par. 55) In July 1964 a public hearing on the Phillips project was held before the Oil Import Appeals Board, at which EDA strongly supported the Phillips application and numerous oil industry spokesmen appeared in opposition. (Stip. Facts, A-51, E-532, E-628)

In February 1965, Secretary of the Interior Udall announced that the Department would enter final negotiations with Phillips to determine the feasibility of the project, and its potential for maximum economic benefit for Puerto Rico. (Stip. Facts, A-51, E-803)

The Secretary's announcement in February 1965 triggered further protests from oil industry representatives and major oil companies, and further public hearings were subsequently held. (Stip. Facts, A-54-55, E-824)

In the spring of 1965, against this background, the final terms of the contractual arrangements between Phillips and the Commonwealth of Puerto Rico for the project were negotiated. The terms included a series of commitments by Phillips to continued investment in Puerto Rican development, including (a) the reinvestment in Puerto Rico of all profits of the facility for its first ten years of operation and (b) a guaranteed minimum additional investment of $55 million in satellite plants around the core petrochemical facility (E-901-05)—commitments which no other sponsor had been prepared to make. (Tr. 2008; E-810, 818-19, 923-24)

The agreement between Phillips and the Puerto Rican Government was thereafter concluded on May 27, 1965, but because of continuing opposition from oil industry groups and competing oil companies, the quota allocation necessary for the project was not granted until December 1965. Pursuant to the agreement between Phillips and the Puerto Rican Government, a Delaware corporation known as "Phillips Puerto Rico Core Inc." was organized in January 1966 and upon its formation was jointly owned, 75% by

Phillips and 25% by the Puerto Rico Industrial Development Company (PRIDCO), a public corporation of the Commonwealth Government.* (Stip. Facts, A-59)

(6) Phillips' Compensation of Those Who Contributed to the Development of its Petrochemical Project

When Mr. Chapman and his firm were retained by Phillips in November 1963, Phillips agreed to pay a retainer of $25,000 for one year of their services and a success fee of $400,000—contingent upon the grant of an oil import allocation to the Phillips project. (Tr. 1490) In November 1963, Phillips agreed to pay Jack Coan and his Omega Management firm a monthly retainer of $2000 (E-321) and a success fee of $100,000 upon the grant of the oil import allocation. (Tr. 1490) Coan received a total of $40,000 for twenty months of services under the monthly retainer arrangement and, after the grant of the oil import allocation in December 1965, Coan was paid his $100,000 success fee by Phillips in January 1966 (E-1800), and arrangements were similarly made for the individual members of the Chapman law firm to receive their shares of the firm's success fee. Coan died in March 1966. (Stip. Facts, A-59)

(7) The Lack of any Contribution by Shippee and His Associates—1963 to 1965

Although Shippee and his associates Willey and Young, as well as their friend Anderson, did not participate in the difficult efforts undertaken by Phillips and EDA in the second half of 1963, 1964 and 1965 to secure the necessary oil import quota for the Phillips project, they appear to have closely monitored the progress of the project throughout that period. (Tr. 336-38, E-1030) At no time, however, during that period did they ever challenge any action taken by Phillips or EDA.

For his part, Shippee in July 1964 filed an action in the District Court for the Southern District of New York

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* In 1970, PRIDCO sold its 25% interest to Phillips. (Stip. Facts, A-59)

against Mohawk Airlines,* claiming damages in respect of the air crash in which he was involved in July 1963. (E-1827) In a deposition in that action given by Shippee on December 29, 1965 (only 8 days after the granting of the oil import allocation for the Phillips project) Shippee claimed that, as a result of the Mohawk air crash, he had been unable after July 1963 to continue with the promotion of his Puerto Rican refinery project. According to his sworn testimony, Shippee "lost all ability to concentrate and initiate and carry on the project which demanded a lot of time and attention and creative thought." As a result of such disability, "I [Shippee] was not able to continue with it and the project has gone ahead without me." (Tr. 518) He further testified that "the negotiations which I was controlling grounded to a halt and the other interested parties, essentially the Commonwealth of Puerto Rico, in my absence turned in other directions and completed it without me." (Tr. 521, E-1817) For his resulting "lost earnings" with regard to the Puerto Rican project, Shippee claimed $1,500,000 in damages. (Tr. 519-21, E-1816) (The Court will note that this is the amount awarded by the jury's verdict.)

Despite the above testimony, which confirmed the withdrawal by Shippee and his associates from efforts to promote a Puerto Rican refinery project, Shippee nevertheless wrote to Stanley Learned, the President of Phillips, on December 13, 1965 (just two weeks prior to Shippee's Mohawk deposition), and purported to accept the proposal made more than three years earlier by Phillips to assist the Shippee-Warburg group in its attempt to develop a refinery project for Puerto Rico. (E-1864) Thereafter, Shippee and his associates made various demands on Phillips during the first half of 1966, claiming the right as joint venturers to the entire equity interest in the Phillips' project. (Tr. 380-81, 401-03; E-1828)

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* *Shippee* v. *Mohawk Airlines*, 64 Civ. 2105 (S.D.N.Y.). The action was marked settled in December 1967. (Tr. 530, E-1827)

On June 9, 1966, Phillips rejected any claim of Prudential's entitlement to participate or share in any rights of the Puerto Rican project.*

(8) The Collusive Assignment of the Claims in Suit, the Commencement of This Action and the Settlement of Shippee's Claim against Mohawk Airlines

One month after the rejection of his claims (and two months after exhibiting to Phillips a draft state court complaint),** Nathan M. Shippee, acting under authority of Prudential Delaware's*** Board of Directors, incorporated plaintiff under the laws of the State of New York on July 12, 1966. (Stip. Facts, A-33) The next day, Prudential Delaware transferred "all of its right, title and interest . . . in and to the joint venture with Phillips Petroleum Company in respect of the project for a petrochemical complex in Puerto Rico" to plaintiff. In exchange, plaintiff conveyed to Prudential Delaware all of its authorized and outstanding stock. (Stip. Facts, A-37)

Thereafter, Prudential Delaware was the sole owner of plaintiff whose only asset was its claim against Phillips and the right to use the name Prudential Oil Corporation. In its answers to defendant's [jurisdictional] interrogatories, sworn to April 26, 1971, plaintiff admitted that since its

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* June 9, 1966 letter of the General Counsel of Phillips, William J. Zeman, to Prudential Oil Corporation. (E-1051) The Zeman letter concluded that "Phillips Petroleum Company has no obligations, expressed or implied, to either Prudential Oil Corporation or to you personally. Consequently, any further conferences or negotiations relating to your claim would be of no avail." (E-1051)

** At a meeting with Phillips representatives in May 1966 Shippee exhibited a draft of complaint against Phillips, which asserted a claim on behalf of Prudential Delaware to the entire equity interest in the Phillips Puerto Rican project. (E-1828) The allegations of the draft complaint were substantially similar to those in the present action, but the complaint indicated that suit would be brought in the "Supreme Court of the State of New York, New York County."

*** Prudential Oil Corporation (Connecticut) is not, and has never been, a party to this action. In 1965, Prudential Connecticut reorganized itself as a Delaware corporation also named Prudential Oil Corporation ("Prudential Delaware") and Prudential Connecticut was subsequently dissolved.

incorporation in July 1966, plaintiff has maintained no books of account, that the "s[o]le business of plaintiff Prudential New York is the prosecution of this action" (Answer to Interrogatories 3(a)-(e) and 4), and that this action is prosecuted "to recover the property rights of Prudential Delaware [sic] in and to the petrochemical complex in Puerto Rico presently administered by Phillips Petroleum Company" (Answer to Interrogatory 12(a)) (A-108). Mr. Shippee and his secretary were the only officers of Prudential New York. (Answer to Defendant's Interrogatory 18, sworn to April 26, 1971, A-111)

On October 3, 1966, the Board of Directors of Prudential Delaware authorized and directed the company's officers, "at such times as they deemed it advisable *and in the best interests of Prudential Delaware,*" to commence a lawsuit against Phillips in the name of Prudential New York. (Stip. Facts, A-38, emphasis added)

On September 27, 1967 the present action was commenced in the name of Prudential New York.*

In December 1967, Shippee's action in the District Court against Mohawk Airlines was marked settled. (Tr. 530, E-1827) The Mohawk deposition was never disclosed by Shippee to Phillips (or apparently even to Prudential's trial counsel) (Tr. 528-530) and it was only through the independent investigation of Phillips and its counsel that Phillips in April 1975 was able to obtain this document.

D. The Proceedings at Trial

At trial plaintiff devoted its principal efforts to proving the existence of a joint venture between it and Phillips for

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* Defendant Phillips filed its answer to the above complaint on October 19, 1967, stating as a defense that plaintiff Prudential New York had been collusively made a party to the suit, and that consequently subject matter jurisdiction was lacking under 28 U.S.C. § 1359. (A-28) On December 1, 1969 plaintiff initiated a second action against Phillips in the Supreme Court of the State of New York, New York County, Index No. 18661/69, *Prudential Oil Corporation v. Phillips Petroleum Company*. The complaint in that action, with the exception of the jurisdictional allegations, is in all respects identical to the complaint filed in this action. By order of the New York State Court dated January 16, 1970, all proceedings in the State Court action were stayed pending final disposition of this suit.

the construction of a petrochemical facility in Puerto Rico. The theory of Prudential's case was that Phillips had agreed to apply to the Interior Department in its own name for an oil import allocation which would in fact be used for the benefit of Prudential or for a joint venture consisting of Phillips and Prudential.

The alleged scheme was necessary, according to plaintiff, because an import allocation could be awarded only to a company with a history of importing petroleum into the United States. As a consequence Prudential was not eligible and was to remain an undisclosed principal in dealings with the government.

No written agreement of joint venture with Phillips, either providing for a fictitious application to the government or otherwise, was produced by Prudential at trial. Nor did any officer or director of Prudential testify to any conversations with any senior officers of Phillips during the years 1962 and 1963 when the alleged joint venture was supposed to have been formed. The sole testimony relating to discussions of a "partnership" relation at that time was provided by Anderson who, although retained as a consultant by Phillips (Tr. 750), purported to act as a "go-between" among various members of the Shippee-Warburg group (with some of whom he had separate business ties) and between the group and Phillips' management. (Tr. 755) Anderson, however, did not testify as to any of the purported terms of the alleged joint venture.

Nevertheless, despite the absence of any tangible evidence that Phillips had agreed to assume any partnership obligations to Prudential, plaintiff produced several witnesses (each of whom claimed a personal stake in the outcome of this action (Tr. 525-528, 891-92)), who testified to the work they had done in furtherance of the "joint" effort. (Shippee Tr. 147-323; Willey Tr. 613-650; Young Tr. 804-842) Shippee, who was then chairman of Prudential, asserted that he and his associates had formulated certain business "concepts" which had made possible Phillips' successful completion of the petrochemical project.*

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* For a discussion of the purported concepts see *infra* pages 31-39.

After eight days of trial, however, during which plaintiff's witnesses were in hopeless conflict as to the nature of the business concepts (Tr. 202-203, 670-71, 823-31), the Court was required to ask plaintiff's counsel to state for the record exactly what the concepts were that plaintiff claimed it had formulated. (Tr. 110[illegible] The answer provided, when stripped of its verbiage, was that plaintiff's concept was the construction of a conventional gasoline refinery which would be required "either by a quasi-public utility concept or a right of first refusal" to produce high quantities of petrochemical feedstocks at some point in the future if and when any chemical companies located in Puerto Rico and sought such products. (Tr. 1103-04) This indefinite approach, of course, was precisely what the Puerto Rican government would not endorse. (Tr. 1997; E-1792, 553-54, 818-19, 923-24)

Plaintiff's last witness, Lawrence Rosenthal, an investment banker, provided the only evidence offered by plaintiff as to the purported value of its "concepts". Mr. Rosenthal had no expertise in the relevant fields of technology. (Tr. 1137) Nevertheless, he offered his "expert" opinion, over defendant's objection (Tr. 1145), that in an arrangement between Phillips and Prudential, Prudential would have received an interest worth approximately $14.6 million in exchange for its "concepts". (Tr. 1149)

Defendant's first witness, Sam Van Hyning, an economic consultant to EDA, traced the origins of Phillips project in EDA's efforts to establish a petrochemical industry in Puerto Rico. (Tr. 1274-1289) Reading from the depositions of Rafael Durand, the Administrator of EDA, and Josiah Norton, the A.D. Little representative who was a consultant to EDA on the third refinery project, defendant established the adverse evaluation by EDA of the Prudential project and its brochure* (E-1799, Tr. 1958-60; *cf.* E-807-08; 815, 818-19), that substantial petrochemical output

* Norton was advised in March 1963 by Ivan Irizarry (an EDA representative) that "EDA is becoming disenchanted with Prudential." Irizarry stated that "Prudential had put together a nonprofessional prospectus and had included several embarrassing statements they had been told to keep out of written reports." (E-1799)

from the outset of operations was an essential condition to EDA's support of any project (Tr. 1961, 1997; E-818, 1792) and that no company other than Phillips was prepared to make a substantial commitment to produce petrochemicals from the outset. (Tr. 2008)

The history of Phillips' involvement in Puerto Rico, its contacts with prior projects for the Island and the independent development of its own petrochemical project were testified to by A. Dale Fischbeck, the manager of project development in Phillips' New York Office (Tr. 1348-88), Roy Waldby, Phillips' manager of Puerto Rican operations (Tr. 1666-1706), Stanley Learned, the former president of Phillips (Tr. 1478-1520), and Leo Johnstone, another Phillips officer with intimate knowledge of the project. (Tr. 1621-26)*

Finally, several expert witnesses testified on Phillips' behalf. Bruce K. Brown testified that the alleged concepts formulated by Messrs. Shippee, Willey and Young were of no novelty or use in furthering a petrochemical project in Puerto Rico in 1962 and 1963 (Tr. 1809-1815); that what was required to make such a project feasible at that time was a commitment to produce at least 50% petrochemicals from the facility (Tr. 1816); and that, in Brown's view, constructing a third gasoline refinery in Puerto Rico in 1962 (such as Shippee proposed) was not politically feasible. (Tr. 1814)

Joe Moore, an oil and petrochemical consultant, also testified regarding plaintiff's alleged concepts. He stated that the project designed and constructed by Phillips was not a "flexible" gasoline refinery operating as a quasi-public utility, but rather a petrochemical plant modeled by Phillips after the petrochemical plant built by it at Sweeney, Texas in the 1940's. (Tr. 1864-69)

Finally, since the District Court had refused to strike the testimony of Lawrence Rosenthal, defendant called Rodger Widmann, an investment banker, who testified as to the practices prevailing in the financial community with

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* Mr. Johnstone testified that Phillips' investment in Puerto Rico had totalled more than $167 million. (Tr. 1648)

regard to the compensation of project promoters and finders generally. (Tr. 1913-1925) He testified that in an investment transaction of the size of Phillips' petrochemical project, a promoter who did not invest in the project would generally receive a fee on the order of $70,000 (Tr. 1925), and in exceptional circumstances perhaps as high as $125,000. (Tr. 1932)

At the close of trial the Court instructed the jury that they were to consider plaintiff's claims on three theories: (1) that Phillips entered an implied in fact contract with Prudential to compensate it for any business concepts devised by Prudential and used by Phillips (Tr. 2251-54); (2) that Phillips misappropriated and used some legally protected concepts of Prudential (Tr. 2240-51); and (3) that Phillips was liable to Prudential in quasi-contract for use of Prudential's concepts. (Tr. 2254-57)

The jury returned a verdict of $1.5 million. In answers to special interrogatories, the jury indicated that its verdict was based on findings of a taking pursuant to an implied in fact contract and misappropriation. The jury further specified the date either of the taking pursuant to implied contract or of the misappropriation as December 16, 1963. (Tr. 2316)

E. The Decisions of the District Court

(1) The Court's Determination of Subject Matter Jurisdiction in Advance of Trial

The District Court denied defendant's motion, prior to trial, to dismiss the complaint pursuant to 28 U.S.C. § 1359 for lack of subject matter jurisdiction based on a collusive assignment between related corporations of the claims in suit. (398 F. Supp. 233, A-471) The first question raised by this appeal is the correctness of that decision.

(2) The Court's Dismissal of Plaintiff's Claims of Joint Venture and for Equitable Relief during Trial

At the close of plaintiff's case, the Court dismissed so much of the complaint as was based on the theory of joint venture on the grounds (1) that plaintiff failed to prove the

essential terms of such a venture, resolving all questions of credibility and weight of the evidence in plaintiff's favor, and (2) that the joint venture claimed by plaintiff would have been unlawful, against public policy and fraudulent as involving the filing of a false application for an oil import allocation for the benefit of Prudential Connecticut and/or others as undisclosed principals or joint venturers. (Tr. 1251; A-515-16)

At the same time the Court also dismissed all claims for equitable relief (Tr. 1249-1251), ruling that plaintiff (1) had an adequate remedy at law; and (2) had otherwise failed to prove that it was entitled to any equitable relief. (Tr. 1251; A-515-16)

Plaintiff filed no notice of cross-appeal from that part of the judgment which dismissed its claims of joint venture and for equitable relief.

(3) The Court's Denial of Defendant's Post-Trial Motions

Defendant moved consecutively for judgment notwithstanding the verdict and for a new trial. The Court denied both motions, but in its decisions (A-503, 525) in no way considered (a) what "concept" of plaintiff's was taken; (b) whether any "concept" of plaintiff was of such a nature as to be "legally protected"; (c) whether such "concept" was known to Phillips prior to its claimed taking; and (d) whether any such "concept" was in fact used by Phillips in the advancement of its own project.

As to the award of $1.5 million against Phillips for "taking" from plaintiff the "concept" of building a crude oil refinery in Puerto Rico, Judge Brieant found the verdict "larger by far than we would award in a bench trial, resolving all fact issues in favor of the plaintiff." (A-525) But noting that jurors "are not inhibited by the jaded cynicism of lawyers and judges who know only too well that 'it is hard to make money easy' ", Judge Brieant concluded that "our jurors are entitled to apply to the cases before them their common sense and their perception of truth and value." (A-525)

In rejecting defendant's contentions regarding the proper computation of prejudgment interest, the Court, contrary to fact, as well as New York law, equated the date of the taking or misappropriation found by the jury—December 16, 1963—with the date of any damage to plaintiff in the form of a deprivation of money or its equivalent. (A-525)

The issues raised by the post-trial motions regarding the insufficiency of the evidence to support the jury's verdict, the excessiveness of the verdict and the improper calculation of prejudgment interest, are all presented (with the jurisdictional issue) by this appeal.

ARGUMENT

I.

The District Court Erred in Concluding that the Assignment of the Claims in Suit to a Shell Subsidiary in Contemplation of Litigation Did Not Violate 28 U.S.C. § 1359.

The District Court's subject matter jurisdiction is controlled by 28 U.S.C. § 1359,* a provision designed "to prevent the manufacture of Federal jurisdiction by the device of assignment", *Kramer* v. *Caribbean Mills*, 394 U.S. 823, 826, 829 (1969). The District Court's order—approving an assignment from a parent to a "shell" subsidiary in contemplation of litigation—is irreconcilable with the policy and standards of § 1359 as enunciated by the Supreme Court in *Kramer* v. *Caribbean Mills*, 394 U.S. 823, and this Court in *O'Brien* v. *Avco Corp.*, 425 F.2d 1030 (2d Cir. 1969) and accordingly, the judgment against Phillips, based solely on diversity jurisdiction, must be reversed.

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* 28 U.S.C. § 1359 provides:

"A District court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise has been improperly or collusively made or joined to invoke the jurisdiction of such court."

A. The Question of Law Determined by the District Court

In denying defendant's motion to dismiss, the District Court held that:

> if the assignment [of claim] was made for a *bona fide* business purpose, wholly apart from acquiring Federal jurisdiction over the instant claim, then it was not collusively made to invoke [federal] jurisdiction (A-482).

In applying this standard, the Court relied upon inferences which it drew from admissions and answers to interrogatories, and specifically declined to make findings subject to Rule 52, F.R. Civ. P. The District Court thus recognized that it would be equally open to this Court, on appeal, to evaluate independently the underlying jurisdictional facts as well as the applicable standards of law. (A-487-88)

The inferences relied upon by the District Court included the following:

> (1) Prudential Delaware engaged in a comprehensive plan of reorganization in 1966 aimed at facilitating an intended public offering of shares in an oil and gas drilling program (A-482);
>
> (2) the particular purpose of the plan was to isolate the drilling program (which was assigned to a wholly owned subsidiary named Prudential Funds) from Prudential Delaware's more speculative ventures (A-483, 485);
>
> (3) in connection with the reorganization Prudential created several single-purpose subsidiaries and assigned to each a particular project initiated by the parent (A-483); and
>
> (4) the reorganization plan was effected for a *bona fide* business purpose (A-483, 485).*

* The Court appears to have derived this standard principally from *National Surety Corporation* v. *Inland Properties, Inc.*, 286 F. Supp. 173 (E.D. Ark. 1968), a case decided prior to the controlling Supreme Court decision of *Kramer* v. *Caribbean Mills*, 394 U.S. 823 (1969). In *Inland Properties* it was held that any *bona fide, i.e.*, nonfraudulent, transfer would defeat an inference of collusivity under § 1359. The *bona fide* transaction approach appears to have been expressly overruled in *Caribbean Mills*, see 394 U.S. at 829, considered *infra* pp. 24 to 26.

In reaching its conclusion that the assignment was not collusively made, the Court noted that the assignment to the plaintiff was "one of several options reasonably available to Prudential [Delaware's] management" and that the Court would "not attempt to test this exercise of business judgment by wisdom acquired after the event" (A-485). The Court discounted the fact that the sole asset of plaintiff (received by assignment from its parent) is its claim against Phillips and that the sole business activity of the corporation is the prosecution of this action, "because this was not the necessary consequence at the time the assignment was made" (A-486).

At no point did the District Court find or infer that the creation of Federal diversity jurisdiction was not an "object" or "motive" of the assignment. Rather, the Court determined that such a purpose was permissible, provided the over-all reorganization of which the assignment was alleged to be part represented an exercise of reasonable business judgment.

Nor did the Court focus on the particular assignment in question to determine whether the transfer of the claim from Prudential Delaware to plaintiff was required by any set of objective business circumstances. The Court simply determined that Prudential Delaware had a *bona fide* business reason for separating its drilling program from its other business activities, and that the further decision to reorganize the remainder of its business into "single-function" subsidiaries—and assign its claim against Phillips to one of them—was a reasonable exercise of business discretion which should not be subject to further judicial examination.*

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* The particular purpose of the reorganization—*i.e.*, the isolation of the drilling program to facilitate a possible future public offering of its shares—was accomplished by the establishment of Prudential Funds, a wholly owned subsidiary of Prudential Delaware, to which the drilling business was transferred in June 1966. (Stip. Facts, A-33-35) The assignment of other projects of Prudential Delaware to "single-function" subsidiaries occurred at roughly the same time, but does not appear to have been directly connected with any anticipated public offering. (Affidavit of Nathan M. Shippee, sworn to April 30, 1975, A-255-56.) The District Court made no findings as to whether any of these subsidiaries actually engaged in any business following the reorganization.

Phillips submits that the permissive standard of "business discretion" adopted by the District Court, as well as its failure to focus on the particular transaction in issue, fail to implement the test of collusivity applicable to inter-corporate assignments under 28 U.S.C. § 1359.

B. The Standard Properly Applicable under 28 U.S.C. §1359 to Inter-corporate Assignments

28 U.S.C. § 1359 has been construed by the Supreme Court on only one occasion since its enactment in 1948. In *Kramer* v. *Caribbean Mills, supra,* a Panamanian corporation assigned its interest in a contract debt to Kramer (a Texas citizen) who immediately executed a separate agreement to pay 95% of any recovery on the debt to his assignor. In affirming a dismissal of the complaint after trial and verdict for plaintiff, the Supreme Court noted that the Panamanian corporation retained a substantial interest in the lawsuit despite its assignment to Kramer and that the "assignment was *in substantial part motivated* by a desire by [Panama's] counsel to make diversity jurisdiction available. . . ." 394 U.S. at 828, emphasis added. The Court found that an assignment made on these terms "falls not only within the scope of § 1359 but within its very core." 394 U.S. at 830.

The standard set forth in *Caribbean Mills* was subsequently extended by this Court from cases involving assignments, to cases involving the appointment of non-resident administrators and guardians. In *O'Brien* v. *Avco Corp.*, 425 F.2d 1030, overruling *Lang* v. *Elm City Construction Co.*, 324 F.2d 235 (2d Cir. 1963), Chief Judge Kaufman explained the reason for the extension and strict application of the rule:

> The historical rationale for diversity jurisdiction was that out-of-state parties might be subjected to undue prejudice in state courts, and thus ought to be afforded the opportunity to have their cases tried in an impartial forum. See *Bank of the United States* v. *Deveaux*, 9 U.S. (5 Cranch) 61, 87, 3 L.Ed. 38 (1809) Marshall, C.J. The continued validity of Marshall's argument, in a mobile and urban society has been questioned by scholars.
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> • • •

> Even under that rationale, however, there can be no excuse for engulfing the already over-burdened federal courts with cases involving controversies between citizens of the same state, who seek to invoke federal jurisdiction through sham transactions. 425 F.2d at 1033

The *Avco* Court further noted as "strong evidence of the type of abuse at which the present section 1359 was directed" a proposed recodification of federal diversity statutes by the American Law Institute, which provided, *inter alia*, that "whenever *an object* of a sale, assignment, or other transfer of the whole or any part of an interest in a claim or any other property has been to enable . . . the invoking of federal jurisdiction . . . jurisdiction of a civil action shall be determined as if such sale, assignment, or other transfer had not occurred." 425 F.2d at 1035 and note 4, emphasis added.

The analysis provided in *Avco* is clear and cogent: if the justification for diversity jurisdiction is fear of prejudice to out-of-state parties, then, whatever the continuing validity of this policy, it can provide no basis for permitting parties of the same citizenship to claim federal jurisdiction by means of assignments which effect no substantive changes in interest. This is particularly so, moreover, in cases where the assignments can be conveniently undone at the close of litigation and are justified by no compelling business purpose. *See Lehigh Mining & Manufacturing Co.* v. *Kelly*, 160 U.S. 327 (1895); *Miller & Lux* v. *East Side Canal & Irrigation Co.*, 211 U.S. 293 (1908).

As a consequence where an assignment permits the assignor to continue participation in the claim any "motive" or "object" to create Federal jurisdiction renders the assignment collusive for purposes of § 1359.* In the

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* This rule has been further extended to cases where the assigning corporation dissolves following the transfer where, as is true in the present case, nothing but a naked claim is assigned. *Greater Development Company of Connecticut* v. *Amerlung*, 471 F.2d 388 (1st Cir. 1973). In light of the policies underlying § 1359, the District Court's opinion is in direct conflict with this decision.

present case the District Court made no inquiry into whether Prudential Delaware sought to "make diversity jurisdiction available," *Kramer* v. *Caribbean Mills, supra,* 394 U.S. at 828, in assigning its alleged claim, despite substantial objective evidence that the assignment could have had no other purpose. Instead, the Court was satisfied that the transfer was "one of several options reasonably available" and was made contemporaneously with a set of other assignments for which there was, or may have been, a legitimate business reason. (A-485)

C. Assignments Between Related Corporations Require Special Scrutiny

The District Court also failed to give effect to the rule requiring special scrutiny of inter-corporate assignments between related corporations. The reason for such scrutiny is set forth in *Green & White Construction Company, Inc.* v. *Cormat Construction Company,* 361 F.Supp. 125 (N.D. Ill. 1973), a case involving an assignment from a subsidiary to a parent made, as here, in contemplation of litigation:

> While it is conceivable that a subsidiary could prove that an assignment was made to its parent, or vice versa, for legitimate commercial reasons independent of the desire to litigate in a federal court, it must bear a heavy burden of proof since the close relationship between parent and subsidiary *necessarily presents opportunities for the collusive manufacture of such reasons.* 361 F. Supp. 128, emphasis added.
>
> *See Farrell* v. *Ducharme,* 310 F. Supp. 254, 258 n.2 (D. Vt. 1970).

In the instant action the alleged reason for the assignment from Prudential Delaware to plaintiff was a desire to isolate Prudential Delaware's oil drilling business from its other activities in order to facilitate a public financing allegedly contemplated for Prudential Funds, a separate subsidiary of Prudential Delaware. This objective was achieved, however, prior to the assignment in question by

the incorporation of Prudential Funds and the transfer to it of Prudential Delaware's oil drilling program in June 1966. (Stip. Facts, A-33) Moreover, the public financing of Prudential Funds did not take place until nearly two and a half years later in December 1968. (A-257)

Under these circumstances, the alleged business purpose motivating the assignment of the claim in suit does not rise to the level of a compelling and independent "commercial reason" of the kind contemplated by the *Green & White Construction Company* Court. On the contrary, it is precisely the kind of self-serving *post hoc* re-interpretation of events against which that Court gave warning.

D. Shippee's Mohawk Deposition and His Manipulation of Litigation in the District Court Underscore the Collusive Nature of the Assignment of Claims in Suit

In determining that Prudential Delaware's selection of plaintiff in July 1966 "to administer its rights in the claimed joint venture" with Phillips was "one of several options reasonably available to Prudential [Delaware's] management" (A-485), the Court inferred that implementing the claimed relationship of joint venture with Phillips remained a plausible goal of Shippee and his Prudential companies until shortly before the filing of the complaint in this action. Thus, the Court observed:

> Although a draft complaint entitled for filing in New York State Court had been prepared at the time the assignment was made [July 13, 1966], plaintiff did not commence this action until a significant period of time had elapsed after the assignment. It was not until September 11, 1967 that Shippee informed the Prudential Board of Directors [*i.e.*, the Board of Prudential Delaware] that resolution of the dispute with Phillips had become impossible. It may be inferred that, during the fourteen months hiatus, there remained some expectation that amicable resolution of the dispute could be achieved, possibly on terms that would have permitted Prudential to participate actively in the Puerto Rican venture (A-485-86).

However, this important inference by the Court—that Shippee in May 1966 and for more than a year thereafter, viewed participation in a Puerto Rican venture as a plausible right and opportunity of the Prudential companies—is directly contradicted by Shippee's Mohawk deposition testimony of December 1965, sworn to February 18, 1966, which conceded that he had been unable after July 1963 to participate in any such venture. (Tr. 513-521) The record thus indicates that by May 1966 (when Shippee exhibited the draft State Court complaint against Phillips) (E-1828), the goal of Shippee and Prudential Delaware was to achieve by litigation (and threat of litigation) what Shippee had already conceded was unavailable to him as a business right and opportunity.

Whatever business justification may have existed for reorganizing the drilling fund business of Prudential Delaware in 1966, the particular object of the assignment of the claims in suit was to make a Federal forum available and thus facilitate Shippee's objective of litigation against Phillips. Shippee's subsequent delay in bringing suit cannot diminish this collusive purpose of the assignment when made; and such delay in bringing suit is not unrelated to his pursuit of inconsistent claims in *Shippee* v. *Mohawk Airlines*, which was marked settled in December 1967. (Tr. 530, E-1827)

E. The District Court's Erroneous Test of Collusivity Fails to Protect Against the Manufacture and Abuse of Federal Diversity Jurisdiction

The business reason accepted by the District Court resulted directly from its reliance on the permissive standard of "business discretion" and its belief that any reasonable "business option" may constitute a justification for an otherwise collusive assignment. Such an approach to collusivity is directly precluded by the rule of *Caribbean Mills* which requires that a more searching inquiry be made and a more demanding standard of justification be met.

In the absence of such an inquiry the policy behind § 1359—to limit the flow of ordinary contract and tort litigation into the Federal Courts—would be subject to casual defeat by the ingenuity and inventiveness of parties seeking

a Federal forum. *Farrell* v. *Ducharme*, 310 F. Supp. at 258, n.2. Nor does such a rule in cases of inter-corporate assignments work any hardship on parties seeking relief or unduly restrict the exercise of sound business judgment. The real party in interest may always seek redress in the Courts of its own State against a defendant who is also a citizen of the same State. And if preference is had for prosecution of the action through a subsidiary or related corporation, no impediment lies. All that is prevented by such a rule is the creation of a means to pursue relief in the Federal Courts where, prior to the assignment, no Federal jurisdiction existed.

The anomaly of applying a lesser standard is obvious from the facts of this case. A Delaware corporation initially intending to seek relief against another Delaware corporation in the Courts of New York incorporates a New York subsidiary to pursue the claim. The subsidiary then commences an action on behalf of its parent *not* in the Courts of its own State, but in a Federal District Court sitting in New York.* The policy of preventing discrimination which underlies federal diversity jurisdiction is thus entirely turned on its head: first, there is no diversity of citizenship between the real parties in interest to the lawsuit; and, second, the nominal plaintiff declines to sue in its own State Courts, but instead seeks relief against a foreign defendant in the federal Courts, where its parent effectively obtains procedural advantages for its suit, such as a jury trial, which it would not otherwise have had.**

The policies underlying Section 1359 militate against such a result, and require a reversal of the District Court's decision.

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* There was of course no impediment to Prudential New York bringing suit in the Courts of New York, as evidenced by Prudential New York's filing of an identical complaint (except for its jurisdictional allegations) in New York Supreme Court on December 1, 1969, following the decision in *Kramer* v. *Caribbean Mills* on May 5, 1969.

** See *Cogswell* v. *New York, New Haven & Hartford R.R. Co.*, 105 N.Y. 319 (1887), noted by the District Court in its opinion denying Phillips' motion to dismiss. (A-489) *Cf.* Opinion of Judge Edelstein, 392 F. Supp. 1018 (A-130), denying Phillips' motion to strike plaintiff's demand for jury trial.

II.

If the Court Does Not Direct the Dismissal of the Complaint, It Should Vacate the Judgment and Grant a New Trial.

The judgment for plaintiff rests on the jury's finding that Phillips on December 16, 1963 either misappropriated the "concept" of Prudential Connecticut in violation of a confidential relationship or took such "concept" pursuant to a contract implied in fact. The judgment also incorporates the jury's award of $1,500,000 as damages.

Defendant submits that the jury's verdict with respect to liability is without competent support in the record and that the jury's award of damages is unconscionably excessive and tainted by the District Court's prejudicial error in permitting incompetent expert testimony on the subject of valuation. For each of these reasons, the District Court's denial of Phillips' motion for a new trial was a clear abuse of discretion, and defendant accordingly asks that the judgment be vacated and a new trial be ordered if the case is not dismissed in its entirety.

A. There is no Competent Evidence in the Record to Support a Finding of Liability on Either a Contract to Pay for or the Misappropriation of a Business Concept

(1) The Absence of Any Record Basis for a Contract Implied in Fact Was Conceded by Plaintiff

Prior to the Court's dismissal of plaintiff's claims of joint venture and for equitable relief at the close of the plaintiff's case, plaintiff had consistently and emphatically denied that it asserted, or that the record supported any claim based on a contract for the sale of any business concept to Phillips. On January 15, 1976, plaintiff's counsel stated in open court: "I don't think there is anything in the record that indicates that Shippee or Prudential was going to sell this thing like Chapman and get a fee for it. The whole idea of Prudential is an oil company going into this thing. Prudential wasn't a management consultant type company [such as Coan's Omega Manage-

ment]. They wanted to have a project, trying to expand...." (Tr. 1235)*

The failure to assert such a claim for the sale of an alleged business concept did not result from inadvertence or lack of alternatives asserted in the complaint, but rather represented a fundamental position taken by plaintiff—at least from the filing of the complaint on September 27, 1967 through January 15, 1976—to distinguish its alleged position as a joint venturer, on the one hand, from that of Chapman and Coan, who were compensated on the basis of a fee in exchange for what they provided. A claim of a *fee* for what Prudential Connecticut allegedly provided would, of course, have been inconsistent with the claim of an *interest* in an alleged joint venture. To avoid undermining its joint venture claim, plaintiff fastidiously avoided making any claim of a contract to compensate it for a business concept until January 16, 1976, after its joint venture claims had been rejected.

The considered and deliberate position of plaintiff—as confirmed by the above admission of its counsel (Tr. 1235)—is inconsistent with the jury's finding of liability on the basis of such a contract. The jury's verdict should accordingly be set aside.

(2) The Jury's Finding of Liability, Based on a Breach of Contract Implied in Fact or Misappropriation, is Without Competent Support in the Record

Apart from plaintiff's admission that there was no contract to sell business ideas, the record provides no

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* The above statement was supplemented and reaffirmed by the further statement of plaintiff's counsel, emphasizing that if any contract were to be implied in fact, it could only be a contract of joint venture. "I think that you might imply *an agreement of joint venture* where one of the two parties working toward it submits a brochure in which it states that it is going to receive 27 per cent of the equity of the project and the others end up with the majority of it, the jury under those circumstances could imply an agreement whereby the one joint venturer would get 27 per cent if the other uses that material and goes forward with the project. I think that question may be one that could be left for the trier of the facts." (Tr. 1236-1237, emphasis added.)

competent support for the jury's finding of liability on the basis of a contract implied in fact or misappropriation. The jury's finding of liability rested on two essential factual predicates: first, that plaintiff, acting through Shippee, Willey and Young, developed a legally protected concept concerning the establishment of a third refinery in Puerto Rico; and second, that Phillips appropriated such concept of plaintiff and used that concept to Phillips' benefit in the establishment of its petrochemical plant in Puerto Rico. (Tr. 2315-2316)

However, the record provides no support for these necessary predicates of a contract implied in fact or misappropriation of a business concept, since Prudential's concept was (a) completely obvious and publicly known—to Phillips, EDA and others—before its alleged formulation by Prudential (discussed *infra* pp. 33-36); (b) the concept had no utility in meeting the problem which it was purportedly intended to solve (discussed *infra* pp. 36-37); and (c) the record is completely devoid of evidence that the purported concept of Prudential concerning a *gasoline refinery* in Puerto Rico was in any way utilized by Phillips in the establishment of its fundamentally different *petrochemical plant* (discussed *infra* pp. 37-39).

In seeking a new trial because of the lack of competent basis for the jury's verdict, Phillips recognizes the adverse fact that a brochure which it utilized at one time in its Puerto Rican project incorporated introductory sentences from an earlier brochure of Nathan Shippee and his Prudential associates. Such a fact is certainly adverse to Phillips—but it indicates a beginning—not the end of legal analysis.* The case below was not based on plagiarism or violation of common law copyright—and plaintiff sought no damages for the use or benefit of the sentences incorporated in the Phillips brochure. (Tr. 2049) Rather, the

* A comparison of the introductory language in Shippee's brochure and the Phillips' brochure was presented to the jury by plaintiff through a large scale reproduction approximately three feet by three feet, of two pages from plaintiff's trial brief. (P-224) Defendant has included the text of this exhibit as an addendum to this brief.

verdict rested on the alleged disclosure by Prudential Connecticut of a business concept, or a contribution of ideas or services related to the development of such concept, and the alleged use by Phillips of Prudential's legally protected business concept or contribution of ideas and services relating to such concept in the petrochemical facility actually constructed in Puerto Rico.

Whatever the liability and damages which might be found for incorporating some of plaintiff's sentences in a brochure prepared by Phillips and later discarded, no claim of this kind was presented to the jury, and its verdict is not founded (and cannot be sustained) on this basis. Phillips submits that, in contrast to the conceded fact of the copying of sentences, the record contains no evidence that Phillips obtained and utilized any alleged *concept* of plaintiff. For this reason, a new trial is necessary to permit the correction of this fundamental defect in the jury's verdict.

(a) Prudential's Alleged Concept Was Publicly Known and Practiced Before Its Adoption by Prudential

After 8 years of litigation, in which successive teams of plaintiff's lawyers have attempted to inflate (and define) the purported concept of plaintiff, the most pertinent explanation of this concept is that stated by Nathan Shippee in November 1967, one month after this litigation had been commenced:

> The new concept was simply a recognition that you cannot get chemical companies to make commitments in order to have so-called back-to-back contracts to build a refinery, that you have to build a core plant refinery, which will subsequently supply chemical feedstocks, and in the meantime it has got to run. Even though it is a petrochemical refinery, *until it has chemical customers it is a gasoline refinery.* We had to have agreement from EDA, since the last thing they needed was an additional gasoline refinery—they had two—that until the satellite plants were in being, in effect for the first few years, this

> would essentially be another gasoline refinery. And there was no other way to attack the problem. They [EDA] concurred after getting an independent opinion from A.D. Little.* (Tr. 1938, emphasis added)

By Shippee's own admission, plaintiff's concept was for another "gasoline refinery" for Puerto Rico, and "the last thing" the Puerto Rican Government needed was an "additional gasoline refinery." The entire course of pre-trial proceedings, as well as three weeks of trial, produced no evidence in any way qualifying the above central admissions by Shippee. Rather, Shippee's trial testimony only confirmed this earlier statement of his concept. (Tr. 202-203) In view of these admissions, the jury's finding that plaintiff developed any legally protected concept cannot stand.

A third gasoline refinery for Puerto Rico in 1962 was as original as an additional coal mine for Newcastle. In 1962, Puerto Rico already had two traditional gasoline refineries (*i.e.*, refineries which charged crude oil and produced gasoline and heavier fuels)—Commonwealth Oil and Refining Company (Corco) and Gulf Caribe. (Stip. Facts, A-39, Tr. 1812, E-148) Moreover, the particular idea for Shippee's refinery—that at an unspecified future time a portion of its output would be made available to a chemical customer locating near it—had already been practiced at the Corco Refinery—where Union Carbide had established a chemical plan utilizing a portion of Corco's output. (Tr. 1812)

Phillips was completely familiar with these details of Corco's operations—initially from engineering studies of Corco which Phillips conducted in 1956 (Tr. 1349), later as a seller of crude to and purchaser of refined products from Corco, and finally through its continued investigation of possible improvements in Corco's operations in the early 1960's. (E-1868, E-1869-1870) Further, the core concept practiced by Corco (and copied by Prudential in its pro-

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* Actually, as noted *infra* p. 37, neither EDA nor A.D. Little ever gave their approval to any such project. (Tr. 1999-2000; 1966-67; 202)

posal) was simply the common expression of a basic policy concept of EDA to promote core industries—a concept articulated by EDA as early as 1950 and given particular recognition in 1957 with regard to petroleum and petrochemicals. (Tr. 1274, E-1709-10; Tr. 1283-1285) EDA's continued preoccupation with the details of Corco's operations is evidenced by the trial testimony of EDA's economic consultant Sam Van Hyning. (Tr. 1281-1283)

The lack of any consensus among plaintiff's witnesses as to the nature of Prudential's concept is instructive. Nathan Shippee, Prudential's chairman, linked the "idea" of a core plant followed by satellites to the operation of the core plant as a quasi-public utility.

> A. . . .We should require that it have the character of a quasi-public utility, and that it be part of the agreement with the corporation that it has to supply a feedstock, if a chemical company comes to Puerto Rico and requires it, that the chemical companies establishing themselves in Puerto Rico would have the right of first refusal on anything that the refinery could make, *even if the refinery had to make it and suffer a loss,* and that the *EDA would undertake to make good their loss* because it was the purpose of the refinery to form the basis of a chemical industry. (Tr. 202-203, emphasis added)

Plaintiff's second witness, Willey, who was president of Prudential in 1962-63, was less sure, however, that the concept included an agreement by EDA to insure the profitability of the project:

> Q. Mr. Willey, did your concept of a quasi-public utility include the idea that if the refinery having to make a chemical would suffer a loss, that EDA would undertake to make good that loss? A. I had no conversation with EDA about it so I don't know.
>
> Q. Did your concept include that? A. I just don't—no, I don't think so.
>
> Q. There was no idea of an investment guarantee in your concept? A. No. (Tr. 670)

Willey was also of the view that the right of first refusal about which Shippee testified was not a right possessed by chemical companies locating on the island to purchase designated petrochemical feedstocks from the project, but a right possessed by the owners of the project to a priority position as a supplier of those chemical companies they chose to deal with. (Tr. 671)

Moreover, concerning the development by the Shippee-Warburg group of the quasi-public utility concept which plaintiff asserted was its contribution to the Phillips project, Willey testified as follows:

> Q. And did you discuss this proposal with the representatives of the EDA? A. No, I did not.
>
> Q. Were you present at any discussions with the EDA where this proposal was discussed? A. I think not.
>
> Q. Mr. Willey, did you also discuss the proposal that you just referred to with Mr. Young? A. Yes, I did.
>
> Q. And did you hold meetings with Mr. Young and Mr. Shippee to discuss this matter during this period? A. Oh, I would hardly say meetings. I think I was able to do the whole thing in a matter of minutes. It was just a concept. (Tr. 633)

(b) Prudential's "Concept" had no Utility Under the Political and Economic Conditions Then Existing

Apart from the complete lack of originality of (as well as lack of coherence) of Prudential's "concept" for another gasoline refinery in Puerto Rico (as demonstrated above), Prudential's concept was completely out-of-date and had no utility in the particular conditions of Puerto Rico and its relation to United States policy in the early 1960's. After the establishment in Puerto Rico of two traditional gasoline refineries—Corco and Gulf Caribe—the mandatory oil import program was imposed in 1959. In the early 1960's, Puerto Rico had become a net exporter of petroleum products. (Tr. 1285) By Shippee's own admission, the "last thing" Puerto Rico wanted in these

circumstances was "an additional gasoline refinery." (Tr. 1938)*

Political realities in the Commonwealth of Puerto Rico and on the United States mainland from 1959 through 1966 —as established by the uncontradicted testimony of Van Hyning, Durand and Brown—made the establishment of a third refinery along the Corco model (as copied by Shippee) completely unfeasible at that time.

To avoid this contradiction, Shippee in 1967 claimed that EDA had agreed to grant an exception in favor of his project. (Tr. 1938) According to Shippee, EDA concurred in his proposal for a third *gasoline refinery* after getting an independent opinion from A.D. Little. (Tr. 1938) However, the record is clear that (1) EDA never supported Shippee's proposal (Tr. 1999-2000), and (2) Shippee's proposal never received an approval from EDA's consultant A.D. Little. (Tr. 1966-1967; Tr. 202)

(c) No Part of Phillips' Project for a Petrochemical Plant in Puerto Rico Relied on Any Part of Prudential's Concepts for a Traditional Gasoline Refinery

The Phillips plan for a petrochemical plant in Puerto Rico, as formulated by Phillips in 1963 and 1964 and eventually established between 1966 and 1968, in no way relied on or in any way incorporated any part of the Prudential proposal for a traditional gasoline refinery. Rather, Phillips' plan was not for a refinery at all—but instead for a petrochemical plant, using naphtha rather than crude oil, and designed to produce *at the outset* substantial quan-

* This admission is confirmed in the trial testimony of Van Hyning (Tr. 1285), Durand (Tr. 1997, E-1792) and Brown (Tr. 1840). For example, in a March 1962 letter to Texaco, EDA administrator Durand made clear that EDA's support of any proposal for a third refinery complex in Puerto Rico would depend on substantial *petrochemical* production by this new facility. (Tr. 1975, E-1792) Bruce Brown, an unquestioned expert in petroleum and petrochemicals, as well as in governmental regulation of the oil industry, had, during this same period of 1962, reached the same conclusion as expressed in Durand's March 1962 letter (E-1792)—that any third refinery complex for Puerto Rico would have to evidence the reality of a petrochemical enterprise in order to obtain the requisite political support from EDA and the United States Department of Interior. (Tr. 1814, Complaint, par. 11, A-5-6)

tities of petrochemicals—with a limit of no more than 49% gasoline. In contrast, the uncontradicted evidence is that the refinery designs contained in the Prudential brochure (E-1052) would yield no more than an incidental fraction of petrochemicals—no more than 6% of its total output. (Tr. 1782; 1865) In establishing its petrochemical facility, Phillips relied on its substantial experience at the Sweeney, Texas refinery-petrochemical complex. (Tr. 1865; 1868) The facility actually established by Phillips in Puerto Rico was also suggested in the proposal (E-294, 296) presented to Phillips' management by Bruce Brown in May 1962, well in advance of any effort by Prudential in the attempted promotion, or development of purported concepts relating to a Puerto Rican refinery. (Tr. 1707-1708)

Not only are the Phillips and Prudential concepts completely different technically, as described above; the Phillips proposal was unique in its commitment to invest in Puerto Rico (a) all of the profits of the petrochemical plant over 10 years and (b) at least $55 million over a 10-year period in satellite facilities. (E-901-03, E-905) It was these two commitments to Puerto Rico—not the pie-in-the-sky hope that Shippee's gasoline refinery would eventually attract a satellite chemical plant—that proved decisive in obtaining the essential political support of the Commonwealth of Puerto Rico for the Phillips plan. (Tr. 2007, especially Tr. 2008; E-550-53)

These very substantial—and critically important investment guarantees by Phillips should be contrasted with Mr. Shippee's concept of a refinery for which "EDA would undertake to make good their loss because it was the purpose of the refinery to form the basis of a chemical industry." (Tr. 203)*

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* Pursuant to its contractual obligations (E-901-03, 905) to invest in satellite plants in Puerto Rico, Phillips has invested more than $100 million in a fibers satellite plant and at the time of trial was investing an additional $75 million in a second satellite plant. (Tr. 1636-37) In respect to the fibers satellite plant, Phillips has sustained a net loss of $135 million. (Tr. 1660) With profits as of January 1, 1976 of approximately $110 million from the petrochemical plant, Phillips has sustained a net loss of approximately $25 million on its Puerto Rican venture, a loss which, in contrast to Mr. Shippee's "concept", has been borne by Phillips, not the Commonwealth of Puerto Rico. (Tr. 1649, 1660-61)

The erroneous nature of the jury's finding of use by Phillips of any Prudential concept is directly reflected by the jury's fixing the date of taking as December 16, 1963 (Tr. 2316), the date of the initial letter of Stanley Learned to Raphael Durand. (E-323) For the reasons above stated, it is clear that this initial and basic statement of Phillips' plan for a petrochemical plant in no way relied on any alleged concept for a traditional gasoline refinery.*

In view of the manifest lack of record support for any finding of originality or utility of the Prudential "concept", or of its use by Phillips, there is no basis for the implication of any obligation by Phillips to compensate Prudential for such "business concepts." Accordingly, the judgment resting upon such untenable premises should be vacated and a new trial ordered.**

B. An Award of $1,500,000 in Damages Is Manifestly Excessive

Defendant's post-trial motion for a new trial also addressed the inherent defect in the judgment that no jury

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* Moreover, a finding that Phillips took any Prudential concept must be tested against Shippee's sworn testimony of December 29, 1965 in the Mohawk deposition (Tr. 513-521), hardly a week after the announcement of final approval of an oil import quota for the Phillips project. In this testimony, Shippee made no claim at all for the development of any concept related to a refinery in Puerto Rico, but rather characterized his attempted participation in any Puerto Rican project as that of a promoter-manager. (Tr. 517-518) It was in view of his claimed disability to continue his active participation, as required of a promoter-manager, that Shippee in December 1965 claimed $1.5 million in lost earnings against Mohawk. (Tr. 519) Shippee in December 1965 did not suggest that the value (if any) of his contribution to the Puerto Rican project involved the development of any "concept" for a refinery or otherwise. In fact, Shippee's claim to have developed and contributed any "concept" to the Phillips Puerto Rican project was an afterthought—advanced for the first time in this litigation.

** This case is not the first attempt to transform a failed promotion effort into a substantial claim for damages for the use of alleged business "concepts" relating to the Phillips-EDA project in Puerto Rico. *See Krisel* v. *Duran*, 303 F.Supp. 573 (S.D.N.Y. 1969) *aff'd per curiam* 424 F.2d 1367 (2d Cir. 1970), *cert. denied* 400 U.S. 964 (1970). In *Krisel*, the District Court granted summary judgment for defendant noting, among other things, the "very substantial question whether, under New York law, . . . recovery can be had upon an implied in fact agreement for an idea which lacks originality or specificity. . . ." 303 F. Supp. at 577.

could properly place a reasonable value as of December 16, 1963, with due regard for all the circumstances of that time, of $1,500,000 upon the rudimentary and undeveloped business ideas of Prudential.*

The District Court's failure to grant a new trial because of the grossly excessive verdict requires correction by this Court. *Dagnello* v. *Long Island R.R. Co.*, 289 F.2d 797 (2d Cir. 1961)

(1) The Inherent Lack of Value in Any Concept of Prudential

The award as a purported measure of value is manifestly excessive for reasons to which we have previously pointed in urging the lack of any record basis for finding Phillips liable to Prudential—*See* Section IIA, *supra*. These reasons, which we will not repeat in detail, included the fact that:

—Prudential's alleged concepts were publicly known and practiced before their adoption by Prudential (pp. 33-36, *supra*);

—Prudential's alleged concepts had no utility due to political and economic conditions existing in 1963 (pp. 36-37, *supra*); and

—no part of Phillips' project for a petrochemical plant relied on any part of Prudential's concepts, which were for a traditional gasoline refinery (pp. 37-39, *supra*).

In view of the lack of originality and utility of the Prudential concepts, or of their use by Phillips, any award above that of a nominal amount would clearly exceed "the reasonable value of the concepts" which the jury was instructed to determine. While recognizing that "the verdict is larger by far than we would award in a bench trial" (A-525), the Court failed to recognize that the amount

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* Moreover, as developed *infra* pp. 44-50, there is no legal principle which justifies computing interest on that entire amount from December 1963. Such valuation would have to be something which did not exist as of that date, and could have been reached only by referring to events long after December 1963 and to the profits when first realized by Phillips in 1970. (E-1693-94)

of the jury's verdict was flatly inconsistent with the applicable standard of nominal damages for any taking as of December 1963. (Tr. 2047-2049)

In a striking concession, plaintiff admitted, in its memorandum in opposition to Phillips' motion for a new trial, that "the jury apparently decided to accept Shippee's own estimate of the claim in the deposition he gave in the suit against Mohawk Airlines" (E-1883). Since the specific figure of $1,500,000 (a claim of lost earnings because of an airplane crash having nothing to do with the value of a business concept) appears at no other point in the record, plaintiff's acknowledgment of the measure used by the jury further confirms that the jury's verdict is unjustifiable and not supported by any competent evidence upon the record in this case.

The excessiveness of the jury's verdict may be directly related to the prejudicial error of the Court in permitting testimony on valuation by plaintiff's purported expert Lawrence Rosenthal. Mr. Rosenthal had no expertise in the fields of petroleum and petrochemical production or refinery and petrochemical plant design (Tr. 1137), and acknowledged that there were no "uniform rules" or even "general standards" for determining the value of concepts in the abstract. (Tr. 1164-65) Nevertheless, he offered his "expert" opinion that in an arrangement between Phillips and Prudential, Prudential would have received a 25% equity interest in Phillips' Puerto Rican project in exchange for the use of its concepts (Tr. 1147), and valued such "concepts" at approximately $14.6 million. (Tr. 1144) Defendant objected to the entirety of Mr. Rosenthal's valuation testimony (Tr. 1145) as incompetent, both because Mr. Rosenthal acknowledged that he had no experience in the petroleum or petrochemical industries and because the essence of his testimony, *i.e.*, that Phillips would have agreed to give plaintiff a 25% equity interest in the project in exchange for plaintiff's ideas, was not a subject on which expert testimony was either possible or appropriate.

Mr. Rosenthal's valuation testimony—which was the only affirmative evidence adduced by plaintiff at trial of

the purported value of its ideas—was clearly incompetent for these reasons. And the erroneous admission of such improper "expert" testimony contributed to the prejudicial atmosphere in which the jury—by plaintiff's own admission—adopted a personal injury damage figure for the value of Prudential's concept.

(2) The Contemporaneous Fixing of Values at Arm's Length Demonstrates the Excessiveness of the Verdict

Moreover, and most significantly, the excessiveness of the jury's award is demonstrated by the arm's length and contemporaneous fixing of value for the services rendered and contributions made by others in connection with the Puerto Rican project. These recognized contributions included those made by Oscar Chapman and his law firm, by Jack Coan and his Omega Management consulting firm and by Bruce Brown.

Mr. Chapman and his firm commenced their extensive work in furtherance of a Puerto Rican project in December 1961 (Stip. Facts, A-43) and from that time until the end of 1965, they were virtually without interruption engaged in one aspect or another of trying to bring such a project to fruition. (Tr. 1981-1986) For the services to be rendered, including their unique experience and knowledge of prior developments which they brought to the project in November 1963, the Chapman firm received the sum of $25,000 for an entire year's services. The further contingent amount of $400,000 was only to be paid in the future and only if they succeeded in securing the oil import allocation. (Tr. 1490) Even this contingent amount was scarcely a quarter of the sum awarded by the jury to Prudential, and it was only payable in the future after overcoming the enormous opposition and obstacles to obtaining the oil import quota.*

The sustained contribution of the Chapman firm to the development and realization of a Puerto Rican project, over

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* The gross disparity in the award to Prudential has been further distorted by computing interest on the excessive sum from December 1963—a time when the Chapman firm had received a total of only $12,500 (the first half of its $25,000 retainer for the year). (Tr. 1489)

a period of four years, reduces to insignificance any contribution of Prudential. The jury's award to Prudential amounts to a perversion of justice when viewed against the standard of compensation regarded as reasonable by those involved in the transactions.

The contributions of Jack Coan and his Omega Management firm present a similar contrast to any contribution of Prudential. Mr. Coan's period of work extended back to at least August of 1961. (Stip. Facts, A-41) He obtained and paid for the Universal Oil Products study which Shippee used in his unsuccessful brochure. (E-1730) His efforts in developing a project and his close work with the Puerto Rican authorities were also virtually without interruption until 1965. Mr. Coan was the source of much of the material used by Prudential in its brochure. (E-1846) The record shows that Mr. Coan's services were contemporaneously valued in 1963 at the rate of $2,000 per month and that also in his case the contingent payment of $100,000 was only payable in the future if and when an oil import allocation was obtained. (E-321, Tr. 1490) Only in January 1966 did Mr. Coan receive his contingent compensation. (E-1800) In contrast to the award to Prudential as of December 1963 of $1,500,000, Mr. Coan received at that time only an initial $2,000.

For the jury to award three times the amount of the total success payments to the Chapman firm and to the Coan firm, for concepts which were not developed by plaintiff and which, in any event were of no use to Phillips, defies all reason and any sense of fairness in measuring relative contributions to the Phillips Puerto Rican project.*

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* The compensation of Bruce Brown provides still another compelling demonstration of the excessiveness of the award to Prudential. He was an acknowledged authority in oil and petrochemical matters (including all aspects of governmental regulation). His period of involvement with the development of a Puerto Rican project extended over six months in 1961 and 1962, approaching in duration the time for which Prudential was associated with the project. (Tr. 513-521) His analysis in early 1962 presaged the later Phillips' approach which won governmental approval. (E-294, 296; Tr. 1707-08) His contemporaneous arrangements for compensation were made with Mr. Chapman and resulted, but only after the import allocation had been granted, in a payment to him of less than $5,000. (Tr. 1789-1790)

Against the background of the contributions by and the compensation for the Chapman firm and the Coan firm (as well as of Bruce Brown) the compensation awarded to Prudential by the jury (and sanctioned by the District Court) requires correction. Even after giving "the benefit of every doubt to the judgment of the trial judge", the verdict on this record surpasses the "upper limit" recognized by this Court in *Dagnello* v. *Long Island R.R. Co.*, *supra*, 289 F.2d at 826.* Only by granting a new trial can the Court restore reason in such a disparate situation.

III.

Any Pre-Verdict Interest Should Be Awarded From No Earlier Than January 1, 1970, the Earliest Possible Date of Any Actual Damage to Plaintiff.

The judgment below compounded a clearly excessive verdict by awarding an additional $1.2 million in interest, measured from December 16, 1963. If this Court does not order a new trial because of the excessive size of the jury's verdict, Phillips submits that the verdict can be understood —and conceivably rationalized—only as an attempted measure of value at a time much later than December 1963. A verdict of $1.5 million *and* interest from December 16, 1963 are absolutely irreconcilable, since interest from that early date rests on the untenable assumption that Prudential's concepts were worth, and could be translated into, $1.5 million in cash in December 1963. Because such a factual premise for an award of interest is unsupportable, and the principle of such an award contrary to New York law, the judgment below must at least be modified to correct the award of interest.

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* As previously pointed out, Phillips utilized in its initial brochure (E-331) introductory sentences from Prudential's brochure (E-1180), as set forth in the addendum to this brief. Phillips' January 1964 brochure was promptly abandoned as inadequate. This use of language from the Prudential brochure constitutes the only "wrongdoing" on the part of Phillips. The jury may well have thought that Phillips' conduct should not go unpunished, but this offense was not the wrong for which the plaintiff sought damages or that for which the judgment below now stands; and unquestionably, the value of the copied sentences could not have been $1.5 million.

A. Under New York Law the Question is: When Were the Damages "Incurred"?

The award of interest is founded upon the theory that there has been the deprivation of the use of money or its equivalent, and that unless interest is added, the party aggrieved is not made whole. *See* 13 N.Y. Jur. Damages, § 130, p. 623. Mr. Justice Cardozo in 1927 in the leading case of *Prager* v. *New Jersey Fidelity and Plate Glass Insurance Company* stated the rationale in these words:

> While the dispute as to value was going on, the defendant had the benefit of the money and plaintiff was without it. Interest must be added if we are to make the plaintiff whole (citation omitted). 245 N.Y. 1, at 5-6 (1927)

Since 1963 the New York Civil Practice Law and Rules have regulated pre-judgment interest by the provisions of Section 5001. Subdivision (b) of Section 5001 prescribes the date from which interest is to be computed and provides:

> Interest shall be computed from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred. Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date.

Mr. Justice Fein in explaining C.P.L.R. § 5001(b) has stated:

> The statutory test is not the date of breach, but rather the date the loss or damage was actually incurred. As the statute implicitly recognizes, the award of interest is founded on the theory that there has been a deprivation of use of money or its equivalent and that the sole function of interest is to make whole the party aggrieved. It is not to provide a windfall. (*Lesjac Realty Corp.* v. *Mulhauser*, 43 Misc. 2d 439; *Matter of Kavares* (*MVAIC*), 29 A.D. 2d 68.)'' 60 Misc.2d 492 at 493-494, 301 N.Y.S.2d 728 at 731. (Sup. Ct. N.Y. 1969)

The controlling question in each case is when the particular damages were "incurred". No money damage is "incurred" by a plaintiff with respect to the taking or use of a business concept before such time as the plaintiff could have reasonably been expected to have realized money or its equivalent upon the concept.

The jury's finding that there was a taking on December 16, 1963 does not establish or even touch the question of when damages were actually "incurred" by Prudential in the circumstances of this case. No one in December 1963 knew or could have known whether any "taking" by Phillips at that time would or could result in any realization of money from the idea of a project in Puerto Rico, whatever its content. The jury did not find the value of the concept as of any particular time, but was permitted to take into account any actual use to which the concept was put and any contribution it might have made to the ultimate project.

Thus, the jury was instructed that it might "consider the use to which [the concept] was put as one factor in considering its worth" and "compare the contribution" made to the project by various persons with that of Prudential. (Tr. 2261) The jury was also instructed that it might "award that portion of the *profits or value of the ultimate project*" it found attributable to the contribution of the plaintiff. (Tr. 2263, emphasis added)

The purport of the charge on damages was to direct the jury to arrive at a sum which would embrace all elements of value which plaintiff's concepts might ultimately have had, irrespective of the time such value matured. The District Court did not instruct the jury to determine the present value of plaintiff's concepts in December 1963, *i.e.*, to determine the sum of money which the concepts would then have realized. The jury was asked to look at the future and it did. The result is a verdict not based on any 1963 valuation, but only conceivable as an expression of what might ultimately be realized by Prudential in the uncertain future.

The District Court's allowance of interest from December 16, 1963 disregards the effect of its prospective instruc-

tions, and, contrary to New York law, permits interest on damages without regard to the date plaintiff's actual damages were incurred and plaintiff actually deprived of a fund of money upon which income might be earned.

In light of the jury's verdict, as construed by the Court, it is immaterial to the computation of interest whether the recovery is deemed to have been grounded in contract or in tort. The time when actual damages were "incurred" by plaintiff is in all events controlling in calculating interest.

B. Viewed as Damages, Either for Misappropriation or Breach of an Implied in Fact Contract, Interest is Properly Measured from No Earlier than January 1, 1970

The controlling principles in fixing damages and computing interest in a case involving business ideas are found in *DeLong Corporation* v. *Morrison-Knudsen Co.*, 38 Misc. 2d. 508, 237 N.Y.S.2d 216 (N.Y. Co. 1962), *aff'd* 20 A.D.2d 104, 244 N.Y.S.2d 859 (1st Dept 1963) (Breitel, *J.*), *aff'd* 14 N.Y.2d 346, 251 N.Y.S.2d 657 (1964) (Fuld, *J.*),* which plaintiff concedes is applicable to this case. (E-1884)

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* In *DeLong* the taking and use pertained to business information regarding the cost and the manner of constructing and installing jacks which raise and lower off-shore platforms used for oil drilling and other marine purposes. The taking had occurred long prior to the commencement of the action (*see* 20 A.D. 2d at 106, 244 N.Y.S. 2d at 861, citing *DeLong Corporation* v. *Lucas*, 176 F. Supp. 104 (S.D.N.Y. 1959)) but interest was allowed only from the date the action was commenced.

The evidence in the *DeLong* case showed that as a result of the taking of plaintiff's business information, defendant, to the exclusion of plaintiff had received a profitable Government defense contract to install two off-shore platforms. The action was commenced on August 23, 1956, but the defendant did not finish the actual installations until July 1957. Defendant argued that interest should be computed only from defendant's date of completion. However, Judge Brietel, speaking for the Court, stated: "This is not conclusive of when profits would have accrued to plaintiff had it obtained the contract and no tort had frustrated it." (20 A.D.2d at 110, 244 N.Y.S.2d at 865) The Court concluded that it was a matter of conjecture as to the date from which interest should be computed, but that in such circumstances "the computation may be from the date the action was commenced, because the evidence disclosed that the lost profits may have accrued at about that time." (20 A.D.2d at 105-106, 244 N.Y.S. 2d at 861)

(Footnotes continue on following page)

While the allowance of interest in the *DeLong* case was granted by Special Term prior to the effective date of C.P.L.R. § 5001, the Courts on appeal took note of the statutory revision and construed the evolving law consistent with its expression in the new statute. Affording the plaintiff "full indemnification" (*see* 14 N.Y. 2d at 348), the Courts held that the question was when might the lost profits upon the misappropriated business information have accrued to the plaintiff. Similarly, in the case at bar, "full indemnification" of Prudential is assured (disregarding the excessive amount of the verdict) by providing interest on the damages as found by the jury from the time profits might have accrued to Prudential through the development of its claimed concept into an actual Puerto Rican project.

Indeed, plaintiff's basic claim throughout this action is that it was denied the right to participate as a co-venturer in the profits of the project. (Tr. 2053-2056)*

Viewed on the alternative theory as damages for breach of a contract implied in fact, no money or its equivalent was lost to Prudential before such time as it could reasonably have expected payment pursuant to such a contract.

In a contract action the question is on what date or dates any payments under the contract were due and this fixes the time from which interest is awarded. Thus, in *Hollwedel*

See also *Empire Crafts Corp.* v. *Grace China Co.*, 21 A.D.2d 888, 251 N.Y.S.2d 893 (2d Dept. 1964), *aff'd* 17 N.Y.2d 851 (1966). This was an action to recover damages for interference with plaintiff's contractual rights. The Appellate Division found that plaintiff sustained damages by reason of lost profits for the years 1959, 1960 and 1961, and measured interest from January 1, 1961, "the date the total damages were sustained", not from the date of the interference, which commenced before 1958. (NYLJ, July 9, 1963).

* As the Court described plaintiff's position at the charging conference:

> And I must say that your own theory of the case, your own expert said that their share of the profits or of the enterprise, would have been computed only by the negotiation, you see. Your own demand was only for 27½ percent *of the future profits*, the equity position. (Tr. 2056, emphasis added)

v. *Duffy-Mott Co., Inc.*, 263 N.Y. 95, 188 N.E. 266 (1933), Judge Lehman, for a unanimous Court, found that the award of interest on the wages payable to plaintiff calculated to the date of the expiration of his employment contract *seven years after trial*, was erroneous. Judge Lehman concluded that "under no possible theory could the plaintiff be entitled to an *acceleration of the date* when payment of wage would have become due and interest for the unexpired term." 263 N.Y. at 102, emphasis added.

In the present case, the jury has apparently found that Phillips took the Prudential ideas on December 16, 1963 pursuant to a contract implied in fact, but this does not establish when payment for the business ideas would reasonably be made. No one has ever suggested that anyone would have paid plaintiff $1,500,000 in December 1963 for anything.

Any use by Phillips of plaintiff's business ideas in December 1963 provided no basis for "accelerating" to that date the time when any payment was due to Prudential. Rather, such an acceleration, and the award of interest from that date, would be contrary to the law of New York as reflected in the Court of Appeals' decision in *Hollwedel* v. *Duffy-Mott Co., Inc.*, 263 N.Y. 95, *supra*.*

Similarly, in *Prager* v. *New Jersey Fidelity and Plate Glass Ins. Co.*, 245 N.Y. 1, 156 N.E. 76 (1933), which was an action on an implied contract to pay for legal services, interest was awarded from the date payment was due, fixed by the time that payment was demanded. Judge Cardozo's opinion specifies the basis for this award: "If [defendant]

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* Plaintiff below attempted to distinguish *Hollwedel* as involving "an express employment contract providing for periodic payments running beyond the date of the action". (E-1886) Plaintiff, however, does not attempt to explain the significance of an "express" contract for calculating interest, and CPLR 5001(a) provides that interest "shall be recovered upon a sum awarded because of a breach of performance of a contract", without any distinction between "express" and "implied" contracts. Further, the ruling in *Hollwedel* that interest is not recoverable on payments which became due after the trial is an application of the general principle that interest on contractual damages should be awarded only from the date (or dates) payment was due—*i.e.*, the date when damages were "incurred" under CPLR § 5001(b).

choose to keep the money, it should pay for what it kept." 245 N.Y. at 6. Thus, it is not the rendering of the services in *Prager,* or the furnishing of the business ideas by Prudential or their use by Phillips which fixes the time for measuring interest, but rather, under the controlling authority of *Hollwedel* and *Prager,* the time when payment was due.*

Pursuant to the controlling principle of New York law, defendant asks (if the verdict is permitted to stand) that the Court vacate the judgment and fix January 1, 1970 as the date from which to compute interest on the jury's award.**

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* In keeping with these principles, in *Gelco Builders* v. *Simpson Factors Corp.,* 60 Misc. 2d 492, 301 N.Y.S.2d 728 (Sup. Ct. N.Y. 1969), an action alleging inducement of breach and breach of a covenant not to assign payments under a construction contract, Justice Fein concluded:

> Even if it be assumed, as plaintiff contends, that the inducement to breach and breach of the covenant not to assign the payment due under the construction contract occurred on May 2, 1960, it was not proved that any part of the damages were incurred on that date. 60 M.2d at 493, 301 N.Y.S. 2d at 730.

Justice Fein ruled, as we have noted, that "[a]lthough CPLR § 5001 (b) permits interest 'from the earliest ascertainable date the cause of action existed', it excepts 'interest upon damages incurred thereafter' which 'shall be computed from the date incurred.' The statutory test is not the date of breach, but rather the date the loss or damage was actually incurred." 60 M.2d at 493-494, 301 N.Y.S.2d at 731. In *Gelco Builders,* interest was awarded from January 30, 1963, the date of the commencement of the action, since it could not be determined "on what dates the various elements of damage found by the jury were incurred." 301 N.Y.S.2d at 731.

** Were the Court to conclude in the circumstances of this case that the date when Prudential would have or could have realized money or its equivalent for its business ideas is too indefinite to use for the calculation of interest, New York law supports the date of the commencement of the action as an alternative. See *DeLong Corp.* v. *Morrison-Knudsen Co.,* 20 A.D.2d 104 at 110, 244 N.Y.S.2d at 865. Thus, if the Court should decline to modify the judgment to fix January 1, 1970 as the date for the computation of interest, we ask in the alternative that it fix the date as September 27, 1967, the date when this action was commenced. In no event can the award of interest from 1963 be permitted to stand.

Conclusion

The District Court committed fundamental error in finding subject matter jurisdiction to exist where the plaintiff was created solely to make such jurisdiction available. Even if the Court's jurisdiction is sustained, the jury's finding of liability—as upheld by the District Court—is manifestly contrary to, and unsupported by the record and the award of damages is unconscionably excessive. Finally, the Court's calculation of interest on the entire amount of the verdict from December 16, 1963 was improper as a matter of New York law.

For these reasons, the District Court's judgment should be reversed and the complaint dismissed, or alternatively, the judgment should be vacated and a new trial ordered. If the verdict is permitted to stand, the amount of interest awarded must be reduced.

Dated: New York, New York
July 12, 1976

Respectfully submitted,

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APPENDIX

PRUDENTIAL BROCHURE
OF JUNE 1963

"Report In Brief

The purpose of this report is to outline the project for a petrochemical core industry as an essential part of the economic development of Puerto Rico, and to request an oil import allocation to establish this new industry." p.1

"The economy of Puerto Rico will benefit by the establishment of a company whose express purpose is the development of a petrochemical industry." p.1

"This industry will be the means by which a critically depressed area will be transformed into a strong, economic community." p.1

"A petrochemical industry will provide a major construction program; a major area development; an immediate petrochemical feed plant; and future petrochemical plants." p.1

"This program is all based on continuing growth in this area of construction, operation, and new development in a continuing growth cycle, including support industries." p.1

PHILLIPS' BROCHURE
OF JANUARY 1964

"Report In Brief

The purpose of this report is to outline the project for a petrochemical core industry as an essential part of the economic development of Puerto Rico, and to request an oil import allocation to establish this new industry." p.1

"The economy of Puerto Rico will benefit by the establishment of a company whose express purpose is the development of a petrochemical industry." p.1

"The benefits of new, expanding industry are especially valuable since it is planned to locate this complex in a critically depressed economic area on the western side of the Island." p.1

"Thus, this beginning of a petrochemical complex should provide a major construction program and an immediate chemical feed plant as a basis to attract more chemical plants." p.1

"All this should assure continuing growth for several years as this chemical complex and its supporting auxiliaries increase." p.1

'The establishment of a core plant of this type is therefore the essential first step in the establishment of a growing petrochemical industry in Puerto Rico (See Chapter II)'' p.3	''Thus the establishment of a core plant for petrochemicals is essential to the orderly development of the petrochemical industry of Puerto Rico (See Section II).'' p.2
''[EDA representatives] have started construction of port facilities in Mayaguez. They have agreed to clear and provide land for the core plant and set aside other land nearby for the satellite plants. They have agreed to provide housing, roads and to redevelop a critically depressed area.'' Chapter III	''The benefits of new, expanding industry are especially valuable since it is planned to locate this complex in a critically depressed economic area on the western side of the Island.'' p.1
''To implement the establishment of this project, the Commonwealth of Puerto Rico has agreed to clear and provide land, housing facilities, necessary building permits, assistance for support industries, port installation at Mayaguez and other necessary related facilities.''	''Site studies conducted for the Economic Development Administration of the Commonwealth have shown a very satisfactory site near the town of Anasco, just north of Mayaguez on the west coast of the Island. From standpoints of building, harbor development, manpower and housing this location seems to be suitable . . . Full cooperation of the EDA has been promised in site development.'' p.3
''The Commonwealth has stated that this project is of the highest economic priority, should proceed with utmost dispatch, and has their full support.''	''This proposal has the full backing and cooperation of Puerto Rican authorities.'' p.3
Action by Commonwealth of Puerto Rico	

"Stability is added to this plan by virtue of the marketing contract between the company and PHILLIPS PETROLEUM COMPANY, which assures the sales of the available product from the core plant." Chapter VI, Economic Data & Financing Plan	"The assistance of Phillips Petroleum Company's resources in arranging for raw materials and in marketing adds stability to the whole scheme." Section IV—Financial Feasibility of Project
"Board of Directors . . . Mr. Jorge Bird Mr. Rafael Carrion Mr. Hector Ceinos . . ."	"We would expect that Puerto Rican investors would be represented on the Board of Directors of the new corporation." p.4

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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PRUDENTIAL OIL CORPORATION, :

Plaintiff-Appellee, :

-against- : Docket No. 76-7207

PHILLIPS PETROLEUM COMPANY, :

Defendant-Appellant. :

- x

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

GEORGE A. SCHOLZE, being duly sworn, deposes and says that he is an attorney associated with Sullivan & Cromwell, attorneys for Defendant-Appellant; that on the 16th day of September, 1976 he caused the within Brief to be served upon Gold, Farrell & Marks, attorneys for Plaintiff-Appellee by having two true copies of the same delivered to said attorneys at 595 Madison Avenue, New York, N.Y. 10022, by leaving the same with a person in charge of said office.

George A. Scholze

Sworn to before me this
16th day of September, 1976

Eileen L. Franklyn
Notary Public

EILEEN L. FRANKLYN
NOTARY PUBLIC, State of New York
No. 31-1303130
Qualified in New York County
Commission Expires March 30, 1977